

Does an online professional profile violate an employer's confidentiality?

European Labour Law Journal
2021, Vol. 12(1) 102–104
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DOI: 10.1177/2031952521998813
journals.sagepub.com/home/ell



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Abstract

The ECtHR's decision in *Herbai v Hungary* focuses on freedom of expression. However, there is a larger issue that touches upon the overlap of employment obligations and professional engagement.

Keywords

Freedom of expression, online professional commentary, legitimate business interests, confidentiality

Case: *Herbai v Hungary* (Application no. 11608/15), European Court of Human Rights (Fourth Section), 5 November 2019 (Final 5 February 2020).

Provisions: Art.10, European Convention on Human Rights

Factual background, domestic court decisions & ECtHR's reasoning

From 2006, Herbai held a position at a Hungarian bank as a human resources management expert, where his tasks included analysis and calculation of salaries, as well as, staffing management. In January 2011, Herbai (with a colleague in the industry) created and managed a website sharing knowledge, publications, and events about the human resources industry. In its first month, the website published two articles. One was written by Herbai's colleague, entitled 'New year, new strategy – Really new? Really a strategy?'. Herbai wrote the second article, 'Sweet 16%'. His bank employer terminated Herbai on 11 February 2011 for breaching the employer's confidentiality

* The author first discussed this decision in 'An employee's professional online presence in the workplace' (6 January 2020) <http://regulatingforglobalization.com/2020/01/06/an-employees-professional-online-presence-beyond-the-workplace/>

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standards. The bank argued that Herbai's website (with the two noted articles as examples) infringed on the bank's economic interests.

The applicant had mixed results through the Budapest Labour Court (where he lost), to the High Court (where he won) and finally with the *Kúria* (where the Labour Court decision was reinstated). The *Kúria* ruled that the similarities between Herbai's work tasks and the information provided on the website constituted a breach of the employer's code of ethics because Herbai had intended to share knowledge acquired in his work capacity through this website.

Herbai pursued the matter to the ECtHR as a constitutional complaint based upon his right to freedom of expression under Art.10 of the European Convention on Human Rights. The applicable Hungarian law was typically (for this legal issue) intermingled. Act no. XXII on the Labour Code, Article 3(5) stated: 'In the employment relationship, employees shall not engage in any conduct which would jeopardise the legitimate economic interests of the employer, unless so authorised by a legal regulation . . .'. Conversely, Article IX of the Fundamental Law stated: '1. Everyone shall have the right to freedom of speech . . .'. And so, an employee retains the right to free speech, seemingly so long as it does not 'jeopardise the legitimate economic interests of the employer'.

The Fourth Section of the ECtHR ruled in Herbai's favour. In particular, the Court criticised the domestic courts' failure to balance Herbai's right to freedom of expression against the bank's right to protect its legitimate business interests. In so doing, the Court clarified a wider scope for the freedom: 'workplace-related free speech does not only protect comments that demonstrably contribute to a debate on a public matter'.¹ The right included discussion on matters of interest to a professional audience.

Commentary

Innovations in information technology, coupled with the ambitions of individuals seeking to promote their work, precipitated the litigation in *Herbai*. With little surprise, employees engaged in knowledge or service industries have taken the initiative to also establish a name for themselves using online sources; whether these are platforms such as LinkedIn or creating a website that offers industry-specific information. Online self-promotion, for many, may seem almost obvious. Consider how many individuals utilise their social media accounts to identify personal work-related achievements. The more common issue has been the intermingling of work and personal lives through these various platforms. *Herbai* uncovers another aspect of the interconnection between the online and physical workplaces; viewing websites such as Herbai's as exclusively work-related.

The issue for the Fourth Section of the European Court of Human Rights was whether Herbai's operation of this website conflicted with his role for the Bank. The website contained a profile of Herbai (with his photograph) in which he was identified as a human resources management expert who worked in the HR department of a large domestic bank (the profile did not identify the employing bank). The bank objected on the basis of disclosing confidential information. Implicit in the bank's argument is the suggestion that employees (especially those in the professional services industries) who comment online regarding industry developments may be - unwittingly or otherwise - disclosing information confidential to the employer or its business interests. Put another way, by commenting online, the employee reveals some aspect of company strategy.

1. *Herbai* [43].

Herbai offers a discrete set of facts against which to engage with an issue that is likely to arise again. The Court's ruling contains a laudable approach to speech protection insofar as it encourages a wider notion of what constitutes free speech than the more commonly accepted idea of political speech. However, it undervalues the nuances of the bank's argument regarding safeguarding its economic interests. Consider the questions the bank's argument suggests. Has the knowledge being shared in a professional capacity been gained exclusively through an employee's work tasks? Does sharing such information constitute an inadvertent disclosure of the employer's strategic approach to an industry development?

It cannot be argued that an employee gains all of her knowledge at the workplace; for many professional services industry positions require some formal education and/or training. And yet, there is a mutuality to these situations. An employee creating an industry-specific information website or utilising a social media platform for the same purpose, where views are exchanged, is also marketing herself as a person of note in that field. In the employee's attempt to develop a leadership profile, the employer also gains as an entity which itself may be a leader and employs such people. The issue, then, is not one of clear advantage being taken by one side over the other.

This topic speaks to the digitalisation of work, an in particular the expanding capabilities of information technology being used for professional engagement. The online influencer has arisen as a unique entity directly attributable to innovations in information technology (particularly social media, coupled with the conglomeration of users on a few popular platforms). As a result, individuals may accumulate vast numbers of followers for their accounts as well as the potential influence these platforms may have over that free audience.² With *Herbai*, there is a confluence of labour and branding (the latter with a commercial element). An employee may establish an online profile in order to advance her career. Lingering considerations include: to what degree employers may limit employees' free speech when these employees are discussing topics (on open access platforms) within their area of work expertise.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

2. The work perspective of social media influencers is discussed in Part II of Catalina Goanta and Sofia Ranchordás (eds) *The Regulation of Social Media Influencers* (Cheltenham: Edward Elgar, 2020).